

Criminalising children for no good purpose: The age of criminal responsibility in England and Wales

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• Time to reconsider?

In England and Wales, children are deemed to be criminally responsible, and become subject to the full rigour of the criminal law, from the age of ten. Children too young to attend secondary school may nonetheless be arrested and detained at a police station. They can be prosecuted and, if convicted, will receive a criminal record that, for some purposes, must be declared indefinitely.¹ If a 10-year-old commits an offence considered to be a 'grave crime', he or she will be tried in the Crown Court and may be given a custodial sentence equivalent to that available in the case of an adult.² Similarly, a child of that age co-accused with an adult will be subject to trial in an adult venue.

The current arrangements have attracted considerable criticism: the United Nations Committee on the Rights of the Child, for instance, has repeatedly expressed the view that the present minimum age of criminal responsibility is not compatible with the United Kingdom's obligations under international standards of juvenile justice and the UN Convention on the Rights of the Child.³ The government has made it clear, however,

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¹ The Rehabilitation of Offenders Act 1974, as amended by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, provides for most convictions to become 'spent' after a specified period. Custodial sentences of four years or longer are not however covered by the provisions. Moreover, a range of occupations – including those that involve working with children or other vulnerable persons, police, probation officers, police and crime commissioners, and the medical and legal professions – are exempted from the Act. Applicants for such jobs are required to disclose any previous convictions irrespective of the offence, the sentence imposed and the age at which it was acquired.

² For an overview of the grave crime provisions, see Nacro (2007) 'Grave crimes', *mode of trial and long term detention*. London: Nacro

³ See for instance UN Committee on the Rights of the Child (2008) *Concluding Observations: United Kingdom Of Great Britain And Northern Ireland*. Geneva: United Nations, paragraph 78

that it is not inclined to amend the legislation in this regard. In 2011, Crispin Blunt, then Minister with responsibility for youth justice, told parliament that:

*'[C]hildren aged 10 are able to distinguish between bad behaviour and serious wrongdoing. It is entirely appropriate to hold them to account for their actions if they commit an offence, and it is important to ensure that communities know that a young person who offends will be dealt with appropriately. We have no plans to change the age of criminal responsibility.'*⁴

He reiterated that position in January 2012 at the launch of a report on youth justice produced by the Centre for Social Justice which proposed that the age of criminal responsibility be raised to 12 years.⁵ While acknowledging that the case was *'well argued'*, the Minister explained that he was unable to support the proposal since *'from the age of 10 children are able to recognise what they are doing is wrong and ... it is important that the seriousness of their action is impressed upon them'*.⁶

The National Association for Youth Justice (NAYJ) considers that the arguments for maintaining the status quo are unconvincing: the government's rejection of calls to review the point at which children become criminally liable is motivated by an ideological commitment to appear tough on youth crime rather than a dispassionate review of the evidence. The NAYJ believes that such a review demonstrates that criminalisation of children at such a young age:

- represents a breach of international standards on children's rights;
 - does not take account of children's developing capacity and imputes culpability inappropriately; and
 - is illogical, unnecessary, and damaging.
- **The failure to comply with children's rights**

The UN Convention on the Rights of the Child requires that states should establish an age below which children are presumed *'not to have the capacity to infringe the penal law'*,⁷ but does not specify a minimum age. The Beijing Rules, which detail minimum standards for the administration of juvenile justice, add that the relevant age should not be *'too low, bearing in mind the facts of emotional, mental and intellectual maturity'*.⁸ While this latter provision is clearly not definitive in itself, the accompanying commentary indicates that *'there is a close relationship between the notion of responsibility for delinquent or criminal behaviour and other social rights and responsibilities'* (an issue considered further below). The UN Committee on the Rights of the Child has interpreted this guidance as implying that there is an *'internationally acceptable'* lower limit.⁹ In this context, the international experience is relevant to determining what age of criminal responsibility might be compliant with human rights obligations.

⁴ Hansard, House of Commons, Column 171WH, 8 March 2011

⁵ Centre for Social Justice (2012) *Rules of Engagement: changing the heart of youth justice*. London: Centre for Social Justice

⁶ Blunt, C (2012) *Crispin Blunt speech to Centre for Social Justice launch of report into youth justice system, 16 January 2012*. London: Ministry of Justice available at: www.justice.gov.uk/news/speeches/crispin-blunt/centre-for-social-justice-160112

⁷ United Nations (1989) *Convention on the Rights of the Child*. Geneva: United Nations, Article 40(3)(a)

⁸ United Nations (1985) *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")*. Geneva: United Nations, Rule 4.1

⁹ UN Committee on the Rights of the Child (1997) *General comment No 10: children's rights in juvenile justice*.

A cursory exploration confirms that by international standards, the minimum age of criminal culpability in England and Wales is extremely low: indeed, excluding the other jurisdictions within the United Kingdom, it is the lowest in European Union. To take just a few examples:

- In Luxemburg, the relevant age is 18, as it is in Belgium for all but the most serious offences
- It is 16 in Portugal and Romania
- In each of the four Scandinavian countries, the age of criminal responsibility is 15 years, a threshold shared by the Czech Republic and Estonia
- It is 14 in Bulgaria, Spain, Italy, Germany and Austria
- France, Greece and Poland have all set as 13 the minimum age at which children are criminally liable.¹⁰

In Scotland, the age of criminal responsibility is lower than that in England and Wales at eight years, but children cannot be prosecuted below the age of 12.¹¹ In consequence, a child aged between eight and 12 may be deemed to have the mental capacity to commit an offence, but can only be dealt with through the welfare mechanisms embodied in the children's hearings system.¹² In Northern Ireland, children are deemed to be criminally liable at ten years, but following a review of the youth justice system,¹³ David Ford, Minister for Justice, has confirmed that public consultation shows substantial support for the recommendation to raise the age of criminal responsibility and that his own views favour an increase to 12 or 14 years.¹⁴

When jurisdictions outside of Europe are considered, England and Wales remains an outlier. In Cuba, Chile, the Russian Federation and Hong Kong, the age of criminal responsibility is 16; in Mongolia, Korea, Azerbaijan and Zambia it is 14; and in Canada, Costa Rica, Lebanon and Turkey, it stands at 12 years. A recent survey of 90 countries found that the most common age (adopted by around a quarter of the sample) was 14 years.¹⁵ Taking into account the international experience, the UN Committee on the Rights of the Child has recently come to a more definitive view as to what constitutes an internationally acceptable minimum age. In 2007, it noted that:

*'States parties are encouraged to increase their lower minimum of criminal responsibility to the age of 12 years as the **absolute minimum** age and to continue to increase it to a higher age level.'* [Emphasis added].¹⁶

Against this background, it is perhaps unsurprising that the UN Committee on the Rights of the Child has consistently criticised England and Wales for its low age of criminal responsibility. In 1995, in its first report on the UK's compliance with the UN Convention, the Committee noted that the arrangements were not compatible

¹⁰ Derived from Hazel, N (2008) *Cross national comparison of youth justice*. London: Youth Justice Board and Howard League for Penal Reform (2008) *Punishing children: a survey of criminal responsibility and approaches across Europe*. London: Howard League

¹¹ Section 52 Criminal Justice and Licensing (Scotland) Act 2010

¹² For an overview of the children's hearing system, see Batchelor, S and Burman, M (2010) 'The children's hearing system' in Johnstone, J and Burman, M (eds) *Youth justice*. Edinburgh: Dunedin

¹³ Graham, J Perrott, S and Marshall, K (2011) *A review of the youth justice system in Northern Ireland*. Stormont: Department of Justice

¹⁴ Ford, D (2012) 'Review of youth justice: ministerial briefing' *Official report (Hansard)*, Session 2011/12, 28 June 2012

¹⁵ Hazel, N (2008) *op cit*

¹⁶ UN Committee on the Rights of the Child (1997) *General comment No 10: children's rights in juvenile justice*

with its provisions. Subsequent reports in 2002, and, most recently, in 2008 have reiterated that damning assessment.¹⁷

• A worsening situation?

If children are criminalised earlier in England and Wales than is the norm in other jurisdictions, that differential is widening as a consequence of a discernible international trend to raise the age at which children become liable to criminal sanctions. Hallett and Hazel, for instance, report that between 1977 and 1987 Israel, Cuba, Canada, Argentina and Norway all introduced a higher age of criminal responsibility.¹⁸ More recently, Spain, Ireland, Guernsey and South Africa have done the same.¹⁹ By contrast, the age of criminal responsibility within England and Wales has, for practical purposes, remained at ten years since 1963.²⁰ Indeed it might be argued that the position has deteriorated in a number of respects over that period.

The first half of the twentieth century was characterised by progressive increases in the age of criminal responsibility. The Children Act 1908 provided for a separate juvenile court for children aged seven years and above. In 1933, the Children and Young Persons Act of that year raised the relevant age to eight; 30 years later, further statutory amendment raised the statutory threshold for criminal proceedings to the current age. The welfarist sentiments that had underpinned this upward trajectory were not yet exhausted: the Children and Young Persons Act 1969 legislated to proscribe prosecution of any child below the age of 14 years. It also contained a strong presumption against prosecution of those age 14-16 years. Within a short period, however, the tide had turned and these provisions were never implemented, although they remained on the statute book for 22 years before being repealed.²¹ No government since has given serious consideration to increasing the age of criminal responsibility.

Nonetheless, until 1998 a measure of protection was afforded to younger children by the doctrine of *doli incapax*. The doctrine, of more than 700 years standing, required the prosecution to adduce evidence not only that the child had committed the act alleged, but also that he or she knew that the behaviour in question was seriously wrong rather than just naughty or mischievous. It thus constituted a filter ensuring consideration of issues of maturity, capacity and culpability at the point of charge and trial.²²

In 1996, the House of Lords confirmed the principle and noted that any attempt to abolish it without a corresponding increase in the age of criminal responsibility would serve to expose children to the full rigour of the criminal law at a much younger age than in most of Europe.²³ Eschewing such learned opinion, the New Labour government simply declared the doctrine to be '*contrary to common*

17 UN Committee on the Rights of the Child (2002) / (2008) *Concluding Observations: United Kingdom of Great Britain And Northern Ireland*. Geneva: United Nations

18 Hallett, C and Hazel, N (1998) *The evaluation of children's hearings in Scotland. Volume 2: the international context*. Edinburgh: The Stationery Office

19 Muncie, J (2009) *Youth and crime*. 3rd edition. London: Sage; Bateman, T (2010) 'Youth justice news' in *Youth justice* 10(2); and Bateman, T (2010) 'Youth justice news' in *Youth Justice* 10(3)

20 The current age of criminal responsibility was established by section 16 of the Children and Young Persons Act 1963.

21 Sections 4 and 5 of Children and Young Persons Act 1969 were repealed by section 72 of Criminal Justice Act 1991

22 For an overview of the principle, see Bandalli, S (2000) 'Children, responsibility and the new youth justice' in Goldson, B (ed) *The new youth justice*. Lyme Regis: Russell House publishing

23 *Ibid*

sense²⁴ and legislated for its abolition in the Crime and Disorder Act 1998. Henceforth, all children from the age of ten years were considered '*unequivocally responsible and accountable for choices made and harm caused*' and subject to punishment accordingly.²⁵

The change was implemented immediately on Royal assent and had a clear, abrupt, impact. In 1999, the number of ten to fourteen-year-olds given cautions or convictions for indictable offences was 29% higher than it had been in the year prior to implementation. The equivalent figures for older children saw a fall over the same period.²⁶ The influence continued to be felt over the longer term. Between 1997 and 2007, there was an 87% rise in convictions for 10-12 year-olds and a 55% increase for those aged 13-15 years. The growth in respect of young people aged 16-17 was by comparison just 8%.²⁷

The abolition of *doli incapax* thus represents an effective lowering of the age of criminal responsibility, in contrast to international direction of travel. In retrospect, it can also be understood in the context of broader developments to hold children in trouble more accountable for their actions than hitherto, a process that Muncie and Goldson have called '*adulteration*'.²⁸

- In 1994, the Criminal Justice and Public Order Act reduced, from 12 – 14 years, the age at which custody could be imposed in the youth court
- The same legislation also lowered, from 14 to 10, the age at which children could be sent for trial to the Crown Court for a wide range of offences, including robbery, burglary, supplying drugs, wounding with intent and handling stolen goods
- The Crime and Disorder Act 1998 provided for custodial sentences in the youth court from the age of ten years – though this provision has yet to be implemented – and for the extension of qualifications on the right to silence at the police station to children below age of 14 years
- The Act also introduced child safety orders which target 'criminal' behaviour by children who have not attained the age of criminal responsibility.

• **An inappropriate imputation of culpability**

In his defence of the government's position, Crispin Blunt relied heavily on the assertion that by the age of ten, children know the difference between right and wrong. A similar argument was deployed by the previous administration in its defence of the abolition of *doli incapax*:

*The Government believes that in presuming that children of this age generally do not know the difference between naughtiness and serious wrongdoing, the notion of doli incapax is contrary to common sense.*²⁹

24 Home Office (1997) *No more excuses: a new approach to tackling youth crime in England and Wales*. London: Home Office

25 Bandalli, S (2000) op cit, pages 86-87

26 Home Office (2001) *Criminal statistics: England and Wales 2000*. London: The Stationery Office

27 Puffett, N (2009) 'Drop in youth custody due to coordinated work, says YJB' in *Children and Young People Now*, 11 November 2009

28 Muncie, J and Goldson, B (2006) 'States of transition: convergence in international youth justice' in Muncie, J and Goldson, B (eds) *Comparative youth justice*. London: Sage

29 Home Office (1997) op cit

Such reasoning has an intuitive appeal: there is a sense in which children aged ten understand the difference between right and wrong. Indeed, one might accede that, in most cases, such understanding is attained at a much younger age. But it misses the point. Developing morality is – like literacy – not a once and for all achievement; it improves with conceptual maturity, and in the process takes on a qualitatively different nature. Just as a child who has learned the rudiments of reading would be unlikely to appreciate the finer nuances of a Shakespeare play, so too a primary school pupil who appreciates that stealing is ‘wrong’ is not manifesting an ethical stance that would, for instance, allow him or her to make judgements as to competing claims of right or engage in meaningful discussion of a moral dilemma. It is for such reasons that jury service is not open to all to children from the age at which they are able ‘to distinguish right from wrong’. It is for such reasons too that it is, contrary to the government’s view, entirely inappropriate to ‘hold [young children] to account for their actions if they commit an offence’ in the same way as an adult.

For a variety of physiological and social reasons, adolescents’ cognitive functioning and decision making is different from that of their older counterparts. This is not always immediately apparent because overt physical indicators of maturity are achieved relatively early. Indeed over the past century, the physical development of children and teenagers has accelerated, manifested by an earlier onset of puberty, a process sometimes referred to as the secular trend which is frequently attributed to improvements in nutrition.³⁰ Such visible signs of development are not, however, necessarily reliable indicators of emotional and cognitive maturity.

It has long been recognised that children’s capacity for perspective-taking develops over time. Spelman’s model, for instance, suggests that children only acquire the ability to adopt a ‘third person’ approach to the perspectives of others, allowing a more objective assessment of the position of all parties, between the ages of 10-15 years. A more abstract capacity that permits a coordination of the expectations of society, those of other people in the child’s social circle, and the individual young person’s own perspective is not achieved until later.³¹ Recent advances in neurological science confirm that neural circuits with a significant influence on behaviour continue to develop well beyond puberty. Indeed, one review of the literature concludes that:

Those parts of the brain responsible for emotional processing develop during early adolescence and as a consequence younger teenagers have a relatively limited capacity for empathy towards others, a quality which acts as an inhibitor to offending in older individuals.

There is strong evidence that, from a neurological perspective, the human brain is not fully developed in its capacity for cognitive functioning and emotional regulation until well into the period of young adulthood.³²

³⁰ Coleman, J (2011) *The nature of adolescence*. London: Routledge

³¹ Cited in Coleman, J (2011) *op cit*

³² Prior, D, Farrow, K., Hughes, N, Kelly, G, Manders, G, White, S and Wilkinson, B (2011) *Maturity, Young Adults and Criminal Justice: A Literature Review*. University of Birmingham: Birmingham.

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This reduced ability for engaging in skilled social interaction may also explain, in part, why much adolescent activity occurs in group settings and why young people's decision-making is strongly influenced by how it will play out with the peer group, rather than by other cost-benefit considerations.³⁴ It has also been suggested that an increased focus on contemporaries outside of the family circle represents a natural process of attenuating childhood ties.³⁵ This susceptibility to peer influence is not dispensed with until late teens – or in some cases later.³⁶ Unsurprisingly, research confirms that peer pressure is a significant factor in youth, but not adult, offending.³⁷

The capacity for abstract thought is not present in young children and develops throughout adolescence. A large scale US study, published in 2003, found that reasoning and understanding was significantly more limited in 11-13 year-olds than in 14-15 year-olds. The latter, in turn, performed significantly less well than 16-17 year olds and young adults aged 18-24 years.

The pre-frontal cortex, which is particularly important for decision-making and impulse control, is one of the slowest areas of the brain to mature. There is accordingly an imbalance between the onset of heightened emotional stimulus during early adolescence and the later development of a capacity to control impulsiveness. This appears to play a role in explaining the propensity of teenagers to engage in various forms of risk-taking.³⁸

Compared to adults, young people also have a markedly different perspective on time, in part a consequence of the fact that one year in the life of an adolescent inevitably seems much longer to him or her than it does to someone who has lived over a much longer period. This perspective prioritises short-term outcomes over longer-term consequences, and attaches a relatively low value to deferred gratification or risk avoidance.³⁹ Teenagers' subjective preferences are accordingly more likely to lead to behaviour that, from an adult vantage point, would be regarded as ill judged. While such considerations do not exonerate adolescent anti-social behaviour, they do suggest that any recourse to simplistic notions of understanding right and wrong is misplaced. By the same token, application of a criminal process, underpinned by notions of culpability that assume a capacity to engage in mature, adult oriented, forms of decision-making, is inappropriate and unjustified.

33 Farmer, E (2011) 'The age of criminal responsibility: developmental science and human rights perspectives' in *Journal of children's services* 6(2)

34 *Ibid*

35 Scott, E (2000) 'Criminal responsibility in adolescence: lessons from developmental psychology' in Grisso, T and Schwartz, R (eds) *Youth on trial: a developmental perspective on juvenile justice*. Chicago: University of Chicago press

36 *Ibid*

37 Kazdin, A (2000) 'Adolescent development, mental disorders and decision making of delinquent youths' in Grisso, T and Schwartz, R (eds) *op cit*

38 The Royal Society (2011) *Brain waves 4: neuroscience and the law*. London: Royal Society

39 Scott, E (2000) *op cit*

Cognitive functioning is relevant in another fashion. As Elly Farmer has argued, inflicting criminal sanctions is legitimate only to the extent that suspects and defendants are competent to understand the processes to which they are subject and to appreciate the implications for themselves of particular decisions in relation to those processes. Such competence includes the ability to respond to police questioning and to comprehend the significance of answers given, the capacity to participate effectively in court proceedings, instruct lawyers, give evidence, respond to cross examination and so on.⁴⁰ But there is good evidence that children's capability to understand fully the criminal justice process in such a manner is limited.

The fact that that 10-13 year-olds in England and Wales, despite being the most vulnerable while in police detention, are less likely to request and receive legal advice than any other age group is, in the light of such findings, of considerable concern.

The capacity for abstract thought is not present in young children and develops throughout adolescence. A large scale US study, published in 2003, found that reasoning and understanding was significantly more limited in 11-13 year-olds than in 14-15 year-olds. The latter, in turn, performed significantly less well than 16-17 year olds and young adults aged 18- 24 years.⁴¹ These differences had an impact on how children would react if subject to criminal proceedings. Given a vignette to consider, one half of children in the lowest age band opted for confession as the best choice compared to just one fifth of young adults. Further analysis confirmed that younger adolescents, below the age of 16 years, were significantly more likely to comply with criminal justice authorities than 16-17 year-olds and young adults. Other research confirms that such tendencies are not restricted to cases where the child is guilty but may also lead to false confession. When presented with fabricated evidence purporting to show that they had performed a particular act, a significantly higher proportion of children aged below the age of 17 years were prepared to sign a confession, by comparison with young adults.⁴²

The fact that that 10-13 year-olds in England and Wales, despite being the most vulnerable while in police detention, are less likely to request and receive legal advice than any other age group is, in the light of such findings, of considerable concern.⁴³ It may however be unsurprising. Younger children (those aged 11-13) are significantly less likely to recognise that there is a risk to themselves from the decisions they make in a criminal justice context. Where risk is recognised, those below the age of 16 years are significantly less likely to think that there will be serious negative consequences for them as individuals. The authors of the study conclude that:

Juveniles aged 15 and younger are significantly more likely than older adolescents and young adults to be impaired in ways that compromise their ability to serve as competent defendants in a criminal proceeding. ...

40 Farmer, E (2011) *op cit*

41 Grisso, T, Steinberg, J, Woolard, J, Cauffman, E, Scott, E, Graham, S, Lexcen, S, Reppucci, ND and Schwartz, R (2003) 'Juveniles competence to stand trial: a comparison of adolescents' and adults' capacities as trial defendants' in *Law and Human Behaviour* 27(4)

42 Redlich, A and Goodman, S (2002) 'Taking Responsibility for an act not committed: the influence of age and suggestibility' in *Law and Human Behaviour* 27(2)

43 Kemp, V, Pleasence, P and Balmer, N (2011) 'Children, young people and requests for police station legal advice: 25 years on from PACE' in *Youth Justice* 11(1)

Psychosocial immaturity may affect the performance of youths as defendants in ways that extend beyond the elements of understanding and reasoning that are explicitly relevant to competence to stand trial. Adolescents are more likely than young adults to make choices that reflect a propensity to comply with authority figures, such as confessing to the police rather than remaining silent In addition, when being interrogated by the police [or] consulting with an attorney... younger adolescents are less likely, or perhaps less able, than others to recognise the risks inherent in the various choices they face or to consider the long-term, and not merely the immediate, consequences of their legal decisions.⁴⁴

Any assumption that children can participate fairly in criminal justice proceedings is accordingly incompatible with their different capacities by comparison with adult defendants. Ironically, if a 30 year-old were able to demonstrate that he or she had the mental age of a 10-year-old child, he or she would almost certainly be regarded as unfit to plead; no equivalent recourse is available to a child defendant. Given what we know about adolescent development, criminalising children from the age of ten years is indefensible.

• Illogical, unnecessary and harmful

Illogical

Areas of social policy outside of criminal justice allow for the fact that the capacity of adolescents to make informed choices differ in important respects from those of adults. The legislative framework dealing with children's rights and responsibilities provides for a range of age-related safeguards and limitations.

To take a few examples:

- Buying a pet is restricted to persons over the age of 12 years.
- Children are precluded from any form of paid employment until the age of 13, at which point they can work for up to five hours on Saturday or during the school holidays.
- This provision is the other side of the coin of a statutory school leaving age (currently set at 16 years – but recent legislation, to be implemented by 2013, requires participation of all children in education or training to 18 years of age).
- Children can go into a public house aged 14, but cannot buy alcohol below the age of 18 years.
- While it is legal to smoke at 16 years, purchasing tobacco is not permitted under 18 years.
- Children below the age of 16 cannot claim benefits, buy a lottery ticket, or consent to sex.
- Children cannot legally apply for a provisional licence to drive a car or give blood until they are 17;
- Below 18 years of age, children are not permitted to apply for a credit card or a mortgage, go on active service in the armed forces, perform music

⁴⁴ *Ibid*

professionally abroad, buy fireworks, get married without parental permission, vote, or sit on a jury.⁴⁵

Indeed, the general trend is for an increase in safeguards and a corresponding delay in the point at which children attain rights equivalent to those of an adult. This reflects what is sometimes referred to as a process of 'extended adolescence', manifested – in this context - in changes to the law on sexual consent, participation in education and training, and rises in the age at which tobacco and alcohol can be purchased.

Whether or not this trajectory towards higher levels of state regulation of young people's lives is welcome, and notwithstanding the potential for debate about the legitimacy of the establishment of any particular age threshold, it is clear that this body of controls stands in stark contrast to the attribution of adult-type responsibility from the age of ten to children who infringe the criminal law. The current age of criminal responsibility poses what Barry Goldson has called a problem of '*intra-jurisdictional integrity*'.⁴⁶ Given the other standards that apply to children, it appears as irrational, unwarranted and unreasonable.

Unnecessary

Crispin Blunt, making the case against raising the age of criminal responsibility, argues that '*the numbers affected are minimal*'.⁴⁷ He cites data from 2009/10 showing that just 2,886 children in the 10-11 age range received a substantive youth justice disposal during that year. Figures for the following 12 month period, show a considerable reduction to 2,268.⁴⁸ However, these numbers are only relevant to the extent that one is considering a rise in the threshold for criminal liability to 12 years. This was the modest recommendation in the report to which the Minister was speaking, but there is no reason to restrict the argument to that particular proposal. An age of criminal responsibility of 14 years for instance would have removed 18,172 children from the youth justice system during 2010/11; the equivalent figure in the event of a rise to 16 years would have been 75,136.⁴⁹ Even focusing on 12 as the target age, one might make the point that, while they may represent a relatively small proportion of the total youth justice population, what happens to upward of 2,000 children cannot be regarded as a matter of minimal importance as the Minister's statement implies. If a particular arrangement is patently irrational and demonstrably unjust, it is not an adequate response to point out that it affects a numerically small body of individuals.

There is a sense too in which Mr Blunt's statement reveals ambivalence in the government's position. Just a few years ago, the number of 10-11 years-olds criminalised through the youth justice system was significantly higher than indicated by the more recent data: in 2007/8 for instance, 7,377 children in that age range were subject to a substantive youth justice disposal, more than three times the latest figure.⁵⁰ The fall in the interim period is due, in large part, to

45 Information derived from YouthNet (undated) *What age can I?* available at: www.thesite.org/homelawandmoney/law/yourrights/whatagecani and Childline (undated) *Your rights* available at: www.childline.org.uk/explore/crimelaw/pages/rights.aspx. The duty to participate in education or training was introduced by sections 1 and 2 of Education and Skills Act 2008

46 Goldson, B (2009) "Difficult to understand or defend": a reasoned case for raising the age of criminal responsibility' in *Howard Journal for Criminal Justice* 48(5)

47 Blunt, C (2012) *op cit*

48 Youth Justice Board / Ministry of Justice (2012) *Youth justice statistics 2010/11: England and Wales*. London: Ministry of Justice

49 *Ibid*

50 Youth Justice Board (2009) *Youth Justice annual workload data 2007/08*. London: Youth Justice Board

the introduction of a target to reduce the number of first time entrants to the youth justice system, which has had a proportionately greater impact on younger children.⁵¹ The establishment of the performance measure embodied a shift in government policy away from an understanding – central to the New Labour reforms associated with the Crime and Disorder Act 1998 – that early intervention through the formal youth justice system was necessary to ‘*nip offending in the bud*’.⁵² More immediately, it marked a reversal of an earlier target to increase the number of ‘sanction detections’. This had encouraged the imposition of formal criminal justice measures for ‘*behaviour that would previously not have attracted such an outcome*’.⁵³ A 20% rise in substantive youth justice disposals between 2003 and 2007 was the direct consequence of that earlier target.⁵⁴

The first time entrant measure accordingly reflects the government’s willingness to encourage increased diversion from the youth justice system. The sharp reduction, noted above, in the number of 10-11 year-olds receiving a criminal sanction, indicates that it has met with some degree of success. The most obvious (and effective) mechanism for achieving such an objective, however, would be to raise the age of criminal responsibility. The refusal of the government to countenance that option suggests that policy-makers are content to allow significant falls in the number of children who are criminalised *in practice*, but not to endorse such outcomes through legislative change. The NAYJ considers that this tension is explained by a fear, on the part of policy makers, of being seen as ‘soft’ on youth crime rather than by any evidence-based rationale.

There are, in any event, dangers of relying on the sanction detection target. First, recent history has shown that the criminalisation of children is sensitive to shifts in performance indicators over very short periods. Future increases in the numbers of 10-11 years being drawn into the system cannot therefore be ruled out without statutory amendment. Second, the decline in first time entrants has been accompanied by a rise, from 12% to 16% between 2006/07 and 2010/11, in the proportion of youth offending teams’ caseload from a black or minority ethnic background,⁵⁵ indicating that the element of discretion afforded to decision-making agencies by the first time entrant target has benefited white children to a greater extent than their BME counterparts. Increasing the age of criminal responsibility would address both issues with immediate effect.

The government might respond to such a line of argument by citing the importance of holding children to account for their wrongdoing if future offending is to be averted.⁵⁶ But the empirical evidence in support of such a claim is not auspicious. One third of all children who come to the attention of the criminal justice system reoffend within 12 months.⁵⁷ Rates of recidivism rise with the intensity of intervention and the number of previous disposals.⁵⁸ Research has suggested that ‘*prosecution [of children] at any stage has no beneficial effect in preventing offending*’.⁵⁹ Findings from the Edinburgh Study of Youth Transitions

51 For a more detailed overview of the first time entrant target and its impact on the youth justice population, see Bateman, T (2012) *Children in conflict with the law: an overview of trends and developments – 2010/2011*. London: NAYJ

52 Home Office (1997) *op cit*

53 Bateman, T (2008) ‘Target practice: sanction detection and the criminalisation of children’ in *Criminal Justice Matters*, 73(1)

54 Bateman, T (2012) *op cit*

55 Youth Justice Board / Ministry of Justice (2012) *op cit*

56 *Hansard, House of Commons, Column 171 WH*, 8 March 2011

57 Youth Justice Board / Ministry of Justice (2012) *op cit*

58 Bateman, T (2012) *op cit*

59 Kemp, V, Sorsby, A, Liddle, M and Merrington, S (2002) *Assessing responses to youth offending in Northamptonshire*. London: Nacro

suggest that such outcomes, while disappointing, may simply be an anticipated consequence of the fact that system contact is frequently criminogenic, exacerbating the risk of further involvement in crime. Conversely, '*forms of diversion that serve to caution without recourse to formal intervention ... are associated with desistance from serious offending*'.⁶⁰ In this context, it is not surprising that recent increased diversion from the youth justice system, in support of the first time entrant target, has not, as the government's logic would imply, led to any rise in youth crime.⁶¹ There are, it would appear, other, more appropriate and effective, mechanisms for dealing with troublesome childhood behaviour than criminalisation, an issue discussed in more detail below.

It is, of course, true that preventing offending is not the sole objective of the youth justice system. In exceptional cases, the criminal behaviour of children may be such as to pose a risk to the public. It is sometimes pointed out that an older age of criminal responsibility would have precluded the prosecution of the two 10 year-old-boys convicted of the murder of James Bulger. But it is important, in this context, to distinguish between a desire for punishment and retribution – which the NAYJ believes has no place in determining the treatment of children – and a legitimate concern for public protection. From the latter perspective, the most significant outcome of the trial of Robert Thompson and John Venables was the imposition of a custodial sentence, served in secure children's homes, until their 18th birthday. Had the age of criminal responsibility been higher, such a course would not have been available. However, proceedings in the family court would have resulted in a secure accommodation order allowing the boys to be detained, in a secure children's home, until the relevant authorities considered that they no longer posed a risk. The outcome, for functional purposes, would have been the same and public safety, would not, in other words, have been compromised.

Such a welfare-based approach in the case of Venables and Thompson would also have had other significant advantages over the criminal justice route. The case took more than nine months to come to trial which itself lasted a further 17 days. Such timescales for children of that age are unacceptable. During the period of remand, in order to ensure that due process was not undermined, the only therapeutic input made available to the boys was to determine whether they knew the difference between right and wrong. A welfare approach would have allowed appropriate treatment to commence at a much earlier stage. Reporting restrictions were lifted, necessitating the creation of new identities at the point of release, and making arrangements for reintegration into the community significantly more difficult, with the potential for increasing the risk of further behaviour that might pose a danger to the public. Family proceedings would have ensured continued anonymity in place of naming and shaming, allowing an easier transition from a secure environment.⁶² Such rare cases do not provide a legitimate rationale for retaining the current age of criminal responsibility.

Harmful

If drawing young children into the criminal justice system does little to prevent further offending, to the extent that it promotes recidivism, it is also harmful.

60 McAra, L and McVie, S (2007) 'Youth justice?: The impact of system contact on patterns of desistance from offending' in *European journal of criminology* 4(3)

61 It might be noted too that the 1980s, a previous period during which diversionary and minimal intervention strategies were in the ascendancy, was characterised by a substantial decline in detected youth offending

62 See, for instance, Nacro (2002) *Children who commit grave crimes*. London: Nacro

There is considerable evidence to confirm that criminalisation of children is associated with higher levels of offending in adulthood. This pattern is frequently attributed to a labelling process that inhibits the natural process of *'growing out of crime'*⁶³. Significantly, the effect has been demonstrated across different jurisdictions, including those that adopt more or less punitive approaches to delinquency.⁶⁴

There would appear to be two different mechanisms at play: first labelling a child as criminal can increase involvement in subsequent offending by influencing his or her identity, making it more likely that he or she will continue to associate with delinquent peers; second, the label can contribute to offending in a mediated fashion, by adversely affecting future life chances, making it more difficult to access conventional social environments and impeding structured opportunities for legitimate advancement.⁶⁵

Contact with the youth justice system reduces the likelihood that children will complete school and obtain educational qualifications.⁶⁶ A criminal record also impacts directly on the chances of future employment. Children who have formal contact with the criminal justice system are less likely to be in work as young adults than those whose offending did not result in a formal sanction.⁶⁷ Three quarters of employers indicate that they would either reject a job applicant with a criminal conviction outright or use it to discriminate in favour of other applicants without such a record.⁶⁸ Negative consequences of labelling are more pronounced for children from a disadvantaged background.⁶⁹ In this context, criminalising children through the adoption of a low age of criminal liability can constitute a process of *'cumulative disadvantage... [A] snowball effect' ... increasingly mortgages one's future'* by imposing structural blocks to educational attainment and employment.⁷⁰

The impact of the age at which children may be subject to criminal proceedings also has consequences for the level of child incarceration. Most children deprived of their liberty through the youth justice system are imprisoned for what courts regard as the persistence of their offending rather than the gravity of

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63 Rutherford, A (1992) *Growing out of crime: the new era*. Winchester: Waterside press

64 Huizinga, D, Schumann, K, Ehret, B, Elliott, A (2003) The effect of juvenile justice system processing on subsequent delinquent and criminal behavior: a cross-national study. Washington: US Department of Justice

65 Bernburg, J and Krohn, M (2003) 'Labelling life chances and adult crime: the direct and indirect effects of official intervention in adolescence on crime in early adulthood' in *Criminology* 41(4)

66 *Ibid*

67 *Ibid*

68 Working links (2010) *Prejudged: tagged for life. A research report into employer attitudes towards ex offenders*. London: Working Links

69 Bernburg, J and Krohn, M (2003) *op cit*

70 Sampson, R and Laub, H (1997) 'A life course theory of cumulative disadvantage and the stability of delinquency' in Thornberry, T (ed) *Developmental Theories of Crime and Delinquency*. New Brunswick: Transaction

particular offences.⁷¹ But this is not simply a question of the frequency of children's misbehaviour. A lower age of criminal responsibility affords an extended period during which children can acquire a relatively lengthy antecedent history of detected offending prior to becoming an adult. Where the age of criminal responsibility is higher, children are precluded from obtaining a criminal record until much later. Inevitably, lists of previous convictions presented to the court will, on average, be shorter, and the tendency to lock children up as persistent offenders will be reduced.⁷² It is for analogous reasons that the substantial fall in the number of children drawn into the youth justice system, following the introduction of the first time entrant target, has been accompanied by a sharp reduction in the child custodial population.⁷³

In summary, the low age of criminal responsibility in England and Wales:

- Is inconsistent with approaches to children in other areas of social policy;
- Tends to promote rather than prevent offending;
- Has long term harmful repercussions for children drawn into the youth justice system at an early age; and
- Leads to increased levels of child incarceration.

• The changes required?

Arguing for a rise in the age of criminal responsibility does not imply that children's misbehaviour should meet with no response. In this sense reform of the youth justice system cannot be divorced from consideration of other areas of service provision. In many instances, a relatively low level admonishment will be sufficient to discourage future anti-social behaviour, but it is also true that many children who come to the attention of criminal justice agencies – in particular those whose offending is serious or persistent - have very high levels of welfare need.⁷⁴ If the threshold at which criminal justice responses become available is raised, a transfer of resources to children's services, new forms of provision, and additional staff with particular skills in working with adolescents will be required.⁷⁵

In some respects, this would redress an imbalance created by an increasing focus in recent years on criminal justice sanctions for children who break the law, at the expense of the provision of mainstream and preventive services for that group. As the Centre for Social Justice has recently pointed out, the youth justice system has become '*a backstop, sweeping up the problem cases that other services have failed, or been unable, to address*'.⁷⁶ But the required changes are greater than such an assessment implies since the very existence of the option of arrest and conviction tends to undermine the capacity of mainstream services to deal with children of that age who display difficult behaviour. By contrast, an elevated age

71 Jacobson, J, Bhardwa, B, Gyateng, T, Hunter, G and Hough, M (2010) *Punishing disadvantage: a profile of children in custody*. London: Prison Reform Trust

72 All Party Parliamentary Group for Children (2010) *Children and young people in the youth justice system: report of seminars organised by the All Party Parliamentary Group for Children 2009/10*. London: NCB

73 Bateman, T (2012) "Who pulled the plug?" Towards an explanation of the fall in child imprisonment in England and Wales' in *Youth Justice* 12(1)

74 Jacobson, J, et al (2010) op cit; Youth Justice Trust (2003) *On the case: a survey of over 1000 children under supervision by youth offending teams in Greater Manchester and West Yorkshire*. Manchester: Youth Justice Trust

75 The extensive, and unfortunate, scaling back of the youth service over recent years has led to a regrettable loss of such expertise

76 Centre for Social Justice (2012) *Rules of engagement: changing the heart of youth justice*. London: Centre for Social Justice

of criminal responsibility would both encourage, and require, viewing children's problematic behaviour through a welfare lens; as a symptom of disadvantage and need, rather than indicative of criminality; as a failure of society and responsible adults rather than of the individual child. In the event that the youth justice route is blocked, services capable of responding to behaviour that would previously have been dealt with as criminal will tend to evolve.

In the longer term, such a shift, from a punishment-oriented to a welfare perspective, would extend beyond whatever boundary is established for a higher age of criminal responsibility. Where the difficulties of adolescents up to mid-teenage years are routinely considered to merit welfare intervention, there is likely to be at least some overspill for children up to the age of 18. The European experience suggests that a higher age of criminal responsibility also tends to be associated with a greater focus on alternatives to prosecution for older teenagers even though a criminal justice response would, in principle, be available.⁷⁷

A key question remains. If the relevant criterion is not whether a child understands right and wrong, what is the appropriate age at which to establish criminal liability? Outside of political circles, there is a growing consensus that 10 is unacceptably low. Barnardo's and the Centre for Social Justice have both argued that the age of criminal responsibility should be raised to 12 years for all offences other than murder, attempted murder, manslaughter, rape and aggravated sexual assault.⁷⁸ The NAYJ believes that this position involves an inherent contradiction: there are no grounds for supposing that children who commit the most serious offences are more culpable for their behaviour, or that their cognitive functions develop earlier, than those who engage in shoplifting. It is vulnerable to the argument that it criminalises those children who are most likely to have the highest levels of welfare need.⁷⁹ Moreover, the UN Committee on the Rights of the Child has advised against having differential ages of criminal responsibility, depending on the circumstances, on the grounds that it is confusing and may result 'in discriminatory practices'.⁸⁰ Finally, as has been demonstrated in the earlier discussion of the Bulger case, prosecution in serious cases is not required to ensure public safety.

The Children's Commissioner for England has also called for the relevant age

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⁷⁷ All Party Parliamentary Group for Children (2010) *op cit*

⁷⁸ Barnardo's (2010) *From playground to prison: the case for reviewing the age of criminal responsibility*. Ilford: Barnardo's and Centre for Social Justice (2012)

⁷⁹ In fairness, the Centre for Social Justice acknowledges this latter criticism

⁸⁰ UN Committee on the Rights of the Child (1997) *General comment No 10: children's rights in juvenile justice*

to be 12 years, but without qualification for serious offences.⁸¹ The All Party Parliamentary Group for Children, taking account of the views of the UN Committee on the Rights of Child, noted above, has argued that the relevant age 'should be raised to at least 12 years'.⁸²

The NAYJ, while acknowledging that any definitive age-related threshold is relatively arbitrary, considers that 12 years is below the appropriate age suggested by the evidence reviewed in this paper. Nor is this problem adequately addressed by inserting the proviso 'at least' into any proposal. The UN Committee's formulation would appear to require a concrete proposal for a specific age, with 12 years being the '*absolute minimum*' in the immediate term, to be superseded by a higher age in due course.

The All Party Parliamentary Group on Women has recommended an increase in the age of criminal responsibility to a higher level of 14 years, corresponding with the European average.⁸³ This proposal has the merit of citing a clear rationale and of attempting to bring England and Wales into closer alignment with international practice. In the view of the NAYJ, it still pays insufficient attention to the latest evidence on the development of cognitive functioning and the implications for attributing criminal responsibility. Moreover, it fails to address the issue of internal inconsistency, as regards the incremental acquisition of children's rights and responsibilities. The NAYJ believes that, as a matter of principle, it is unjust to hold children criminally liable at an age below which they can consent to sexual activity. In the light of the evidence, and taking all factors into account, the age of criminal responsibility should be raised to 16 years. Such reform should be accompanied by a review of children's welfare, safeguarding, education, and health law to ensure that responses to children's problematic behaviour are adequate to meet the needs of children and families who would no longer be subject to criminal proceedings, and to promote their wellbeing while protecting the public where necessary.

81 Thompson, A (2010) 'Even Bulger killers were just children, says Maggie Atkinson, Children's Commissioner' in *the Times* 13 March

82 All Party Parliamentary Group for Children (2010) *op cit*

83 All Party Parliamentary Group on Women in the Penal System (2012) *Keeping girls out of the penal system*. London: Howard League for Penal Reform